IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.03.2007

CORAM:
THE HONOURABLE MR. JUSTICE V. DHANAPALAN

W.P. No.8243 of 2004 & W.P.M.P. No.9708 of 2004

Karur District Dyeing & Bleaching Factory
Owners' Association
Room No.2, 20, North Pradakshanam Road
Karur – 639 001
Represented by its President P. Subramanian .. Petitioner

vs.

1 The Assessing Officer
Textile Committee
Government of India
Ministry of Textiles
Coimbatore

2. Union of India
Represented by its Secretary
Ministry of Textiles
New Delhi .. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for a writ of declaration as stated therein

For petitioner Mr. V. Ramachandran, Senior Counsel
for Dr. Anita Sumanth

For respondents Mrs. K. Aparna Devi

O R D E R

The petitioner association has filed this writ petition seeking a Writ of Declaration declaring that the job contracts of bleaching and dyeing entered into by its Members cannot be subjected to imposition of Cess under the provisions of Section 5A of the Textiles Committee Act, 1963.

2. The case of the petitioner association, in short, is as follows:

a. The Members of the petitioner association are owners of Dyeing and Bleaching factories located in Karur District and are engaged in the business of job work of processing yarn received from various customers for the purpose of bleaching and dyeing the same and returning the same to the customers in lieu of which they are

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paid labour charges on job work basis based on the number of bundles for which job work is done.

b. The members of the petitioner association are not involved in the process of manufacture of any product as defined under the Textiles Committee Act (in short "the Act") and they have not been hitherto required to pay any Cess or other duty under the Act and that being the case, some of the members of the petitioner association have received demand notices for the years 2000-2001 and 2001-2002 from the first respondent stating that they are manufacturers of textiles as defined under the Act and as such, they are liable to pay Cess calculated at the rate of 0.05% and also calling upon them to furnish monthly returns in Form A as required under Rule 4 of the Textiles Committee Rules, 1975 (in short 'the Rules") for the entire labour charges received by them.

c. In reply, the notices submitted their elaborate reply explaining that they are not manufacturers of textiles as defined under the provisions of the Act and that the demand notices calling upon them to register and submit returns and also to pay Cess is without jurisdiction and bad in law. The first respondent replied vide his letter dated 18.02.2004 to the explanation of the members stating that as per provisions of Section 5A (1) of the Act, the Central Government has imposed Cess on textiles and textile machinery manufactured in India and if Cess is not paid within one month from the date of Demand Notice under Rule 7 or 8 of the Rules, the amount would be recovered as an arrear of land revenue under Section 5(D) of the Act. In the said letter, he has further referred to a judgment of the Supreme Court in which it has upheld the levy of duty of excise treating as manufacture the process of bleaching, dyeing, sizing, printing, mercerizing, water proofing , etc. done by the processors who carry out these operations in their factories on "job work basis".

d. Further, not considering the objections raised noticees, the first respondent has issued notice of demand dated 03.03.2004 under the Rules demanding Cess and directing them to pay the said demand within one month from the date of receipt of notice which is violative of the provisions of the Act and Rules and hence, the petitioner association, on behalf of its members, has approached this Court with the present writ petition.

3. The main grounds urged in the writ petition are that (i) the members of the petitioner association do not manufacture any of the items falling within the definition of "textiles" under Section 2(g) of the Act and the only activity carried on by them on job work basis is bleaching and dyeing yarn which is already manufactured and a manufactured item cannot be manufactured again, (ii) even assuming without conceding that the process constitutes a process of manufacture, unless there is a manufacture of articles falling within the definition of "textiles" by the assessee, the provisions of the Act cannot be invoked, (iii) though the

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noticees sought a personal hearing, demand is made without affording such an opportunity which is obligatory under the Act and Rules and this vitiates the entire proceedings, (iv) the Cess proposed to be levied has not been hitherto levied since 1975 and if levied, it would eat away a substantial portion of the income of the members thereby putting them to a great hardship which they cannot pass on to their customers.

4. The respondents have filed their counter and their case is as under:

a. Since the definition of the term "manufacturer" has not been defined, the processors were clarified their status as "manufacturer", taking into account the decision of Supreme Court in the case of The Sirsilk vs. Textiles Committee and Others reported in (AIR 1989 SC 317) and as per that judgment, any industry engaged in manufacture or production of any articles mentioned in first schedule of the IDR Act 1951 is brought within the provisions of the said enactment. The IDR Act, 1951, clearly contemplates a processing house as an industry and the said Act is Pari Materia. This being the case, the processor can be said manufacturer for the purposes of the Textiles Committee Act, 1963. As such, processors are liable to pay cess under the Textiles Committee Act, 1963.

b. The respondents had taken up the assessment of members of the petitioner association and since the members failed to submit their returns, the Committee was forced to collect the turnover figures from the Commercial Tax Department to arrive at the amount of Cess payable which is in accordance with the provisions of the Act and Rules.

5. Mr. V. Ramachandran, learned Senior Counsel appearing for the petitioner association has contended Rule 4 of the Rules requiring manufacturers to submit monthly returns would not be applicable to the petitioner association as its members are engaged only in the job work of processing yarn and not in manufacturing activity. According to him, yarn is the raw material used by the members of the petitioner association and the same does not get transformed to fabric or cloth or garment. He has argued that Section 5-A of the Act contemplates levy of Cess only on a manufacturer of textile or textile machinery and the members of the petitioner association, not being manufacturers, are not liable to pay Cess and the notice of demand issued by the first respondent is contrary to the provisions of the Act and beyond the jurisdiction of the first respondent.

6. The learned Senior Counsel for the petitioner has drawn the attention of this Court to a decision of this Court in the matter of Kamalam Rajendran vs. Inspecting Assistant Commissioner of Income Tax (Assessment) reported in 1999 ITR (Vol.237) 299 and contended that a writ petition, which is kept pending for a long time, cannot be dismissed on the ground that there is an alternative remedy and the relevant paragraph of the said judgment reads as under:

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> "In view of the above decision of the Division Bench of this Court, I have no other alternative except to accept the contentions of learned counsel for the petitioner that there is no justification in dismissing the writ petition which was admitted in 1988 and kept pending before this Court for all these years. Therefore, I hold that even though alternative remedy is available under the Act, as the writ petition was admitted by this Court during 1988 and kept pending for ten years, I do not think that it is justified to dismiss the writ petition on the ground of alternative remedy."

7. Further reliance has been placed by the learned Senior Counsel for the petitioner association on a decision of this Court reported in 1995 ITR (Vol. 213) 639 in the matter of Thanthi Trust vs. Central Board of Direct Taxes and Others:

> "Point No.3 – No doubt, the petitioner is having an effective alternative remedy by way of appeal before the appellate authority and further appeal before the Tribunal and these writ petitions could not have been entertained, if this objection, regarding the maintainability was raised and brought to the notice of this court, when these writ petitions came up for admission or immediately thereafter. However, it is seen from the records that some of the writ petitions in this batch, have been entertained by this court in the year 1989 and they are pending for nearly five years. The counter-affidavits in these writ petitions have been filed before this Court only on November 28, 1994, when these writ petitions were taken up for final hearing, raising the contentions that the petitioner is having an alternative remedy and that the writ petitions are liable to be dismissed on that ground. However, as the writ petitions have been admitted and kept pending before this Court all these years, we are of the view that it is not proper to dismiss these writ petitions, at this stage, on the ground that the petitioner has not exhausted the alternative remedy. Inasmuch as these cases involve interpretation of Section 11(4A) of the Act, on the undisputed facts of this case, and as it is also in the interest of the revenue to have the issues in question settled early, the petitioner is not directed to avail of the remedy of appeal. Point No.3 is answered accordingly."

8. Per contra, Mrs. K. Aparna Devi, learned counsel for the first respondent, to substantiate her stand that the processes of dyeing and bleaching amount to manufacture, has contended that the process of manufacture involves (i) change in the form of goods, (ii) change in the utility of goods and (iii) value addition and since all the these three elements are perfectly present in the activities of the members of the petitioner association, they definitely fall under the definition of

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manufacturers. Though it is contended on the side of the petitioner association that its members are only job workers and not manufacturers, the counsel for the first respondent has contended that a job worker can be released from payment of Cess only if such job worker is able to prove the Cess on the end product has been already paid by the merchant dealer and in the absence of such proof, the job worker shall be liable for the payment of Cess under the Act as the workers are not outside the purview of the Act. It is her further case that Cess has to be levied at every stage of manufacturing and such levy of Cess does not amount to double taxation.

9. Finally, it is the strenuous contention of the counsel for the first respondent that under Section 5A(7) of the Act, when there is an appeal provision, the petitioner ought not to have moved this Court with a writ petition and obtained interim injunction by way of mis-representation.

10. In support of her argument that processes of bleaching, dyeing, printing, sizing, finishing, etc. also amount to manufacture, the counsel for the first respondent has relied on a judgment of the Supreme Court reported in AIR 1989 SC 516 in the matter of Ujagar Prints etc. vs. Union of India & Others and Kwality Silk Mills & Another etc. vs. Union of India & others and judgment of the Delhi Court reported in AIR 1997 Delhi 383 in the matter of Nath Brothers Exim. International Ltd. vs. Union of India & Others.

11. On the aspect that the petitioner association ought not to have by-passed statutory remedies available to it, the counsel for the first respondent has relied on a judgment of the Supreme Court reported in 1997 STC (Vol.105) 318 in the matter of State of Goa and others vs. Leukoplast (India) Ltd. (paras 13 and 14)

> ". . .These are basically questions of fact. There was no reason for the assessee-company to by-pass the statutory remedy and come to the court with a writ petition. These questions basically of fact should be agitated before the statutory appellate authority.
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> . . .
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> We are of the view that the assessee should not have been allowed to by-pass the statutory remedies where the questions of fact could have been properly agitated and ascertained."

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12. Before proceeding to analyse the merits of the case, it has to be decided whether the writ petition itself is maintainable when the petitioner association has approached this Court without exhausting the alternative remedy available to it under 5A(7) of the Act. Though the counsel for the petitioner has placed reliance on the judgments reported in 1999 ITR (Vol.237) 299 and 1995 ITR (Vol. 213) 639 (supra) to substantiate his contention that this writ petition should not be dismissed on the ground of availability of alternative remedy, I would

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like to distinguish the same with the facts of the case on hand. Firstly, in the cases relied on by the learned Senior Counsel, the writ petitions were kept pending for quite a long time, say ten years. Finally, there was no undisputed question of fact involved in those cases. In the instant case, it is only just two years and above since the writ petition has been filed. Secondly, in the case on hand, the main point to be decided is whether the processes of bleaching and dyeing carried out by the petitioner constitute "manufacturing" process or not and for determination of this question, there is no definition in the Act under which the petitioner is covered. Thirdly, the point for determination in this petition has to be decided based on material facts available and the same have to be gone into in depth to arrive at a conclusion as to whether the processes of bleaching and dyeing constitute "manufacturing" or not Thus, when the fact remains that the point for determination is a disputed one, in the absence of any definition for the term "manufacture" in the Act, I am of the considered view that only the appellate authority would be the proper forum to decide the disputed question of fact and this view of mine is supported by the Supreme Court's decision reported in 1997 STC (Vol.105) 318 (supra) cited by the counsel for the first respondent. In view of these reasons, the decisions relied on by the learned Senior Counsel cannot be said to be applicable to the facts of the case on hand and in that view of the matter, I have no hesitation in holding that the petitioner has prematurely approached this Court without exhausting the appeal remedy available to it under Section 5A(7) of the Act. Taking into account the fact that the writ petition has been filed just two years before and the members of the petitioner association have not been put to any hardship since they have not paid any cess as claimed by the respondents, I am of the view that the petitioner can very well avail the appeal remedy seeking the relief claimed in this writ petition.

13. Considering the facts and circumstances, the submissions made by the counsel on either side and the judgments relied on by them and the discussion made above, this Court directs the petitioner to prefer an appeal before the appellate authority to redress its grievance. It is also made clear that except the question of alternative remedy, the other issues in this writ petition are left open.

14. In fine, the writ petition stands disposed of by directing the petitioner to exhaust the appeal remedy and for the same, the period of pendency of the writ petition before this Court may be excluded. No costs. Consequently, connected W.P.M.P. is closed.

Before parting with this decision, this Court points out that even in the case reported in AIR 1997 Delhi 383 (supra), the Delhi High Court, while deciding the issue involved, has expressed that there is no definition for the word "manufacture" in the Act. For quite a long time, this issue has been posing problem to the Courts while deciding whether a particular process comes under the ambit of the word "manufacture" or not. Since the word "manufacture" has not been defined in the Act, the Courts are constrained to refer to other parallel enactments to come to a conclusion. This situation can be avoided if the word "manufacture" is

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defined in the Act. Therefore, it is very much necessary for the Union of India to define the word "manufacture" thereby avoiding complication in the matter of assessment of manufactured product, especially when this may fetch substantial revenue to the Government and also avoid unnecessary litigation such as the one on hand. This view of mine may be given due consideration by the Union of India by defining the word "manufacture" by way of bringing in a suitable amendment to the Act.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

cad

To
1 The Assessing Officer
Textile Committee
Government of India
Ministry of Textiles
Coimbatore

2. The Secretary
Union of India,
Ministry of Textiles
New Delhi.

+ 1 CC To M/s.Anita Sumanth, Advocate SR NO. 13824

+ 1 CC To Mr. P.Subba Rddy, Advocate SR NO. 13701

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